Supreme Court, U.S.
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No. 99-1399

In The

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,

Petitioner,

vs.

THE TOWN OF MAMARONECK, THE TOWN BOARD OF THE TOWN OF MAMARONECK, ELAINE PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALERIE O'KEEFE, and BARRY WEPRIN, as Members of The Town Board,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals State Of New York

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INTRODUCTION

The brief filed by the Town, the Town Board, and the Board's Members (collectively, the Town) begs, rather than answers, the questions presented for review. They do this, not the least, by trying to camouflage the New York Court of Appeals' important constitutional adjudication with an avalanche of irrelevant factual minutiae that have no bearing on the holding below.

First, by repeatedly asserting that its new zoning law passed the test of "substantially advancing legitimate state interests" (e.g., pp. 1, 7, 8, 12), the Town evades the threshold question of *what standards* govern that test. The point made by Petitioner Bonnie Briar is that there are *no standards*. Thus, to say that the New York courts upheld the Town's actions based on this amorphous, standardless test proves only that there is a serious need for this Court to grant certiorari to determine *how* lower courts should approach this problem.

Second, by urging that Bonnie Briar cannot argue that it was "singled out" because one other property was also rezoned by this same law (e.g., pp. 1, 5), the Town evades settled decisions of this and other courts that constitutionally preclude foisting community burdens on a limited number of individuals – i.e., that "singling out" a group of two rather than one does not make the practice respectable – or constitutional.[1] For example, the Court of

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[1] As this Court noted recently in *Village of Willowbrook v. Olech*, ___ U.S. ___, 2000 WL 201157 (2000), whether a municipality singles out a class of one or five for constitutionally inappropriate treatment is irrelevant. The constitution protects all points on the spectrum.

Appeals for the Federal Circuit stated the dispositive issue thus:

> "In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to *some number of individuals, less than all,* a burden that should be borne by all?" (*Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560, 1571 [Fed. Cir. 1994]; emphasis added.)

Third, by putting into Bonnie Briar's mouth the specious argument that municipalities must adopt some sort of "least restrictive alternative" requirement (pp. 12-18), the Town ignores Bonnie Briar's actual argument (that regulations must be reasonably necessary to accomplish municipal goals) and seeks to avoid analyzing its regulations in light of *City of Monterey v. Del Monte Dunes,* 119 S. Ct. 1624 (1999). In *Del Monte Dunes,* this Court subjected municipal zoning to the test of reasonable necessity, holding that this is a question for the trial court to determine *on the evidence* – just the opposite of what occurred below.

Finally, the Town's reliance on Bonnie Briar's summary judgment motion is disingenuous. Certainly, as the Town quotes (p. 19), Bonnie Briar believed that – on the facts that were not in dispute – the Town's rezoning could be held to *fail* the test of "substantially advancing a legitimate state interest" because the prohibition of housing was not necessary to achieve it. And if the state courts had agreed with Bonnie Briar, they could have so held. However, when those courts decided not to invalidate the Town's action as a matter of law, then the record clearly

disclosed an evidentiary conflict on the question of whether the Town's action – in the words of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) – was reasonably necessary to effectuate the Town's goals. The Town had evidence it believed showed the propriety of its actions. Bonnie Briar had evidence that showed the same goals could be achieved without eliminating the ability to build *any* homes on this property. That conflict – as in *Del Monte Dunes* – could not be resolved without trial.

Certiorari is amply warranted. Nothing in the Town's brief gainsays that.

I.

IT IS UNCONSTITUTIONAL TO "SINGLE OUT" AN INDIVIDUAL PROPERTY OWNER TO SOLVE A PRE-EXISTING MUNICIPAL PROBLEM. THAT IS PLAINLY WHAT HAPPENED BELOW, AND THAT IS WHY CERTIORARI IS WARRANTED.

The Town's brief concedes, as it must, that there were three problems it sought to solve by rezoning Bonnie Briar's property, *no one of which was or would have been caused by development as envisioned by Bonnie Briar.*[2] First,

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[2] The Town's repeated plaint that there would be no way to guarantee that only 71 homes would be built and that the golf course would remain (e.g., pp. 9, 18) borders on the specious – particularly for a municipality used to wielding planning and zoning powers. Nothing in this litigation would prevent the Town from zoning the property in such a way that the ability to cluster 71 homes as designed by Bonnie Briar would be the only residential use permitted. Nor would the Town be constrained

the Town sought to preserve the only remaining open space in the vicinity, because others had already developed the rest of the land. Second, it sought to preserve recreational opportunities, because the development of the rest of the Town's land by others had left no other venues. And third, it sought to press Bonnie Briar's property into service as a municipal "catch basin" to protect the rest of its residents from flooding by collecting storm waters there. (E.g., p. 1.)[3]

The Town's twofold response is unavailing.

First, the Town misconstrues the "singling out" concept, conveniently redefining it as the "proportionality" concept discussed in *Del Monte Dunes*. (p. 4.) But, although the Town may feel that such definitional sleight-

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from conditioning development permission on such a limitation. Nor would it prevent zoning the other golf course property in such a restrictive way. None of these issues was ever presented below. The Town's attorney is pulling this Court's leg.

[3] The Town appears to have misunderstood – and, at the same time, reinforced – Bonnie Briar's argument about the use of its property as a catch basin. The Town says that the water diverted onto Bonnie Briar's property "naturally flows" there, and is "not diverted there by artificial means." (p. 11, n. 9.) The means by which the water arrives are irrelevant. The point was – and remains – that the Town uses this property for municipal purposes to protect other residents from storm water. Such protection is the Town's duty, and it shouldn't be able to compel Bonnie Briar to provide a public use that benefits the entire community without just compensation. As this Court put it in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the public acquires only those rights in land that it pays for. The rights of the public in a flood control catch basin, the same as those in a public street, are limited to those it has paid for.

of-hand lightens its argument load, it is not sufficient to meet the issue. Bonnie Briar is not urging that there is something "unproportional" about this zoning, but that its property has been *de facto* commandeered to solve municipal problems that it did not – and would not – create. As shown in the Petition, that is constitutionally impermissible.

Second, the Town insists that if two properties were conscripted into such public service, then one could not say that Bonnie Briar has been "singled" out. (p. 5.) This simplistic argument has been answered by the courts many times, as noted in the *Florida Rock* opinion quoted above. Where something is designed to benefit all members of society, then all should pay, not one or two land owners who have nothing to do with the municipal problems the Town is trying to solve by loading the cost on their backs alone.

II.

THE BENCH AND BAR ARE CONFUSED BY THE CONCEPT OF "SUBSTANTIAL ADVANCEMENT OF A LEGITIMATE STATE INTEREST" AND THIS CASE PROVIDES A PROPER VEHICLE FOR PROVIDING GUIDANCE.

The Town does not dispute that bench, bar, and academe are confused by what this Court meant in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and its progeny when it held that a constitutional taking occurs when a land use regulation fails to "substantially advance legitimate state interests." Nor can the Town deny that the law

– and countless parties to land use disputes, not to mention lower courts that get drawn into those disputes – would benefit greatly from clarification.

Instead, in a bit of circular reasoning, the Town says this case cannot serve as the vehicle for explanation because the lower courts held that its regulation satisfies that standard. (pp. 7 *et seq.*)

The problem with the Town's argument is obvious, no matter how many times (or in how many ways) it is repeated: because the rule is without clear standards, the fact that this particular regulation was upheld does not demonstrate the absence of need for clarity. Indeed, it demonstrates the need for review because the present state of the law gives rise to an "anything goes" approach by municipalities – and an "anything can be approved" approach by some lower courts. The most appropriate time for this Court to explain the meaning of the phrase and how it is to be used is here and now, i.e., in the context of a regulation upheld by lower courts without trial. In contrast to *Del Monte Dunes*, for example, the determination here was made as a matter of law. Thus, rather than merely determining whether there was sufficient evidence to sustain the finding of a taking, this Court is in a position to elucidate the nature of evidence required for such a finding, and the standards by which such a finding is measured.

Contrary to the Town's assertion – but because of the reasons advanced by the Town – certiorari is highly appropriate here.

III.

WHETHER THERE IS A "REASONABLE *NECESSITY*" REQUIREMENT IN TAKINGS LAW IS FOR THIS COURT – NOT THE TOWN OF MAMARONECK – TO DECIDE.

The Town says there is no constitutional requirement that land use regulations be "reasonably necessary" to the achievement of municipal goals. (p. 12, *et seq.*) This assertion contradicts what the Court plainly laid out in *Penn Central*, as discussed in the Petition at pp. 22-26. And that requirement has been consistently applied by lower courts in takings cases. In addition to the *Florida Rock* opinion quoted *ante* at p. 2, see, e.g., *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984); *McDougal v. County of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991). As the Court of Appeals put it in *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996), *aff'd*, 119 S. Ct. 1624 (1999), the land owner was permitted to prove that "none of the City's stated reasons for denying its application was sufficiently related to the City's legitimate interests." This Court agreed that it was proper for such a land owner to submit "evidence designed to undermine the validity of the asserted factual premises for the city's denial of the final proposal. . . . " (119 S. Ct. at 1633.) Here, Bonnie Briar was denied the opportunity to make such an evidentiary presentation.

It is quite apparent that both this Court and lower courts believe that a "necessity" analysis is an indispensable part of determining whether regulatory action substantially advances legitimate state interests. But the New York courts disagree. Certiorari is the way to establish this Court's jurisprudence as primary.

IV.

THE TOWN'S SUMMARY JUDGMENT ARGUMENT VERGES ON THE SILLY

The Town's final argument is that Bonnie Briar cannot insist on its right to a trial on the facts because Bonnie Briar moved for summary judgment. Such action, according to the Town, is a confession by Bonnie Briar that there was nothing that needed trial.

Nonsense.

The trial court could have granted summary judgment in Bonnie Briar's favor on the facts alleged by Bonnie Briar. But the converse is not true. Once Bonnie Briar's motion for summary judgment was denied, trial was called for. The record – as must be apparent from the briefing before this Court – was in conflict over the necessity of precluding housing on Bonnie Briar's property in order to achieve the Town's goals. Bonnie Briar contended below that all of the Town's objectives could have been met without denying Bonnie Briar the right to build the proposed 71 homes, while leaving the golf course intact. That the Town disagrees only raises an issue of fact and renders the Town's summary judgment motion inherently improper. That being the case, Bonnie Briar deserved no less than the opportunity afforded in *Del Monte Dunes* to demonstrate the Town's failure to fulfill its constitutional obligations.

CONCLUSION

The reasons for granting certiorari are abundant. Foremost among them is the need for this Court to lift the jurisprudential fog that obscures application of its rule that a taking occurs when a land use regulation fails to substantially advance legitimate state interests. Until this Court does so, lower courts – as demonstrated by the New York courts here – will continue to zig-zag and make up the rules on an *ad hoc* basis as they go. That is not a proper constitutional foundation for a dependable rule of law for citizens to live by.

Bonnie Briar prays that certiorari be granted.

Respectfully submitted,

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